

**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF OKLAHOMA**

NATIONAL WASTEWATER	)	
SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-15-037-KEW
	)	
DANIEL E. SIMON, an individual;	)	
PEGGY J. SIMON, an individual;	)	
MCKITTRICK PRECAST, INC., an	)	
Oklahoma corporation;	)	
C. DAVID RHOADES,	)	
as liquidating receiver for	)	
McKittrick Precast, Inc.; and	)	
SHANNAHAN CRANE & HOIST, INC.,	)	
an Oklahoma corporation,	)	
	)	
Defendants.	)	

**OPINION AND ORDER**

This matter comes before the Court on Plaintiff's Motion to Dismiss Counterclaim (Docket Entry #17) and Plaintiff's Motion to Dismiss Amended Counterclaim (Docket Entry #35). Although the original Motion to Dismiss is rendered moot by the filing of the Amended Counterclaim, this Court left the Motion pending since the subsequent Motion to Dismiss incorporated the arguments from the first Motion.

Defendant McKittrick Precast, Inc. ("McKittrick") was the record owner of the Wagoner County property (the "Property"). Two entities, JP Morgan and the Small Business Association ("SBA") held mortgages on the Property and, upon McKittrick's default on the underlying debt, sought to foreclose on the mortgages. On March 4, 2010, JP Morgan filed a Notice of Lis Pendens in the Wagoner County

land records upon commencing the action to foreclose its mortgage. On December 9, 2010, JP Morgan and SBA obtained a foreclosure judgment.

On May 9, 2011, the Simons received an assignment of JP Morgan's judgment. On May 11, 2011, McKittrick purportedly transferred its interest in the Property to the Simons by Quit Claim Deed. On June 6, 2014, the Simons recorded the Quit Claim Deed in the Wagoner County land records. On the same day, the Simons received an assignment of SBA's judgment and filed it in Wagoner County on June 13, 2014.

For its part, Plaintiff obtained two judgments against McKittrick. Plaintiff perfected one judgment on May 21, 2014 and a second on September 11, 2014.

On February 3, 2015, Plaintiff commenced this action to foreclose its judgments. Plaintiff also alleges that McKittrick fraudulently transferred the Property to the Simons through the Quit Claim Deed recorded June 4, 2014.

On February 23, 2015, the Simons filed an Answer and Counterclaim to the Complaint, which they subsequently amended on June 2, 2015 after Plaintiff's filing of an Amended Complaint. In the counterclaim, the Simons assert that they have provided documentation to Plaintiff indicating that they have a first and second lien on the Property as represented in the mortgages that were assigned to them by McKittrick. The Simons then state that

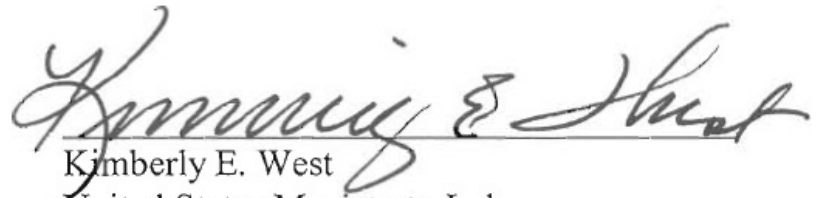
Plaintiff has no claim to the Property and that "this action is malicious in nature and is intended only for harassment." The Simons seek actual and punitive damages in excess of \$100,000.00 on this malicious prosecution claim.

Plaintiff seeks the dismissal of the Simons' counterclaim for malicious prosecution, alleging that the claim has not yet matured. An essential element of a claim of this nature is "a bona fide termination of the proceeding in favor of the present plaintiff." Park v. Security Bank and Trust Co., 512 P.3d 113, 119 (Okla. 1973). Since Plaintiff's base claims remain pending, the Simons' counterclaim for malicious prosecution has not yet accrued.

The Simons attach a letter from their counsel addressed to Plaintiff's counsel to their response to the Motions which ostensibly demonstrates that Plaintiff's judgment is not superior to the Simons' interests in the property. This correspondence does little but put the Simons' defense to the claims in this action in writing. The fact remains that this action is pending and the Simons' counterclaim is premature.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Dismiss Counterclaim (Docket Entry #17) and Plaintiff's Motion to Dismiss Amended Counterclaim (Docket Entry #35) are hereby **GRANTED**. The Simons' Amended Counterclaim for malicious prosecution is hereby **DISMISSED WITHOUT PREJUDICE** as premature.

IT IS SO ORDERED this 16<sup>th</sup> day of September, 2016.

A handwritten signature in cursive script, reading "Kimberly E. West", written over a horizontal line.

Kimberly E. West  
United States Magistrate Judge  
Eastern District of Oklahoma